

proved to steal this specific bicycle which was the subject of the charge, is sufficient to bring the appellant within the scope of the section, as far as intention is concerned, it does not in my view necessarily follow that the requirements of the rest of the section have been fulfilled. There would, of course, be no difficulty had it been shewn that the respondent had kept watch or otherwise assisted Chiang in the removal of the bicycle. But when the action is confined to a single act of pushing a bicycle by one of the accused it seems to me to be straining the language to say it is something done by several persons, even bearing in mind the definition in section 33. The learned Deputy supporting the District Judge's view cited a passage from the judgment of the Privy Council in *Mahbub Shah v. R.*⁽¹⁾ which reads:—

"To invoke the aid of section 34 successfully, it must be shewn that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act was done by him alone."

On the authority of this passage it may at first sight appear that in some cases at least a single act done by one person is sufficient to pin liability on all who share the common intention. Thus, for example, it would appear that if A, B and C lie in wait for X with the common intention of killing him, and if when the victim arrives at the spot A fatally stabs him with a knife, then all will be equally guilty though neither B or C raises a finger throughout the assault. My surmise is, however, that this apparent inconsistency between the wording of the section and its interpretation in *Mahbub Shah's*⁽¹⁾ case is explicable on the basis that once a common intention to kill has been formed mere presence at the subsequent killing constitutes participation in the criminal act since in the circumstances it is reasonable to presume such presence is in furtherance of the common object. But can it be said that mere presence on the roadway, even if one is planning the theft of a bicycle and knows one's companion has a similar intention, renders one a party under section 34 to an actual theft, in which one does not assist in any way, by one's companion? In my opinion before the section applies there must on the construction of its language be more than a joint venture to commit crime. I would say it must be established that more than one person participated in the commission of the criminal act which forms the subject of the charge, although in certain circumstances mere presence may constitute participation. In this case I do not think participation on the part of the appellant has been proved.

On these grounds I consider this appeal should be allowed, and I order accordingly.

Appeal allowed.

TEO PEEN SOON & ORS. v. REG.

[C. C. A. (Whyatt C.J., Knight and Tan Ah Tah JJ.)
May 4, 1956]

[Singapore—Criminal Appeal No. 22 of 1955]

Court of Criminal Appeal Ordinance (Cap. 129), s. 6—Verdict of jury which is unreasonable and cannot be supported having regard to the evidence—Duty of Court of Criminal Appeal to allow the appeal.

Investigation—8 months delay before arrest—Identification—Unsatisfactory nature of the prosecution case. Summing-up—Accomplice's evidence. Alibi—Long delay—Result of.

This was an appeal by the appellants against their conviction for the offence of robbery. It was not suggested that there was any misdirection in the summing up of the learned Judge at the trial. The appellants appealed against the verdict of the jury on the ground that "the verdict was unreasonable or could not be supported having regard to the evidence."

The Court of Criminal Appeal in this case dealt with several unsatisfactory features of the case and came to the conclusion that the prosecution's case was not proved with that certainty which was necessary in order to justify a verdict of guilty and therefore the conviction could not be allowed to stand.

Ordinarily, where the jury have been properly directed by the learned trial Judge in his summing-up and in a case where the prosecution rely upon an accomplice's evidence, he has warned them strictly and with emphasis that they should not proceed upon the evidence of the accomplice unless it is corroborated, the Court of Criminal Appeal will not interfere if the jury convict. But if the Court thinks that the verdict is on the whole, having regard to everything that took place in the Court of trial, unsatisfactory, the conviction cannot be allowed to stand.

Observations on investigation, alibi, and identification.

Cases referred to:—

(1) *R. v. Barnes* 28 Cr. App. R. at p. 192.

(2) *R. v. Wallace* (1931), 23 Cr. App. R. 35.

COURT OF CRIMINAL APPEAL.

Appellants in person.

T. A. Mahony (Crown Counsel) for the respondent.

The judgment of the Court was delivered by:—

Whyatt C.J. :—The three appellants who appear in person were convicted at the October Assizes of the offence of robbery and were sentenced to substantial terms of imprisonment. They appeal against the verdict of the jury on the ground that it was against the weight of the evidence or, to state the ground more accurately in the light of a recent decision of this Court, on the ground that "the verdict is unreasonable or cannot be supported having regard to the evidence."

It is not suggested that there was any misdirection in the summing-up of the learned Judge. On the

contrary, he emphasised to the jury the weaknesses of the prosecution's case, and, in particular, warned them against convicting upon the uncorroborated evidence of an accomplice. He evidently formed a strong view as to the unreliability of the principal prosecution witnesses, one of whom he described as "a thoroughly bad character, unreliable, a bad citizen and one upon whose evidence you could not hang a dog." Nevertheless the jury returned a verdict of guilty against the three appellants.

Now there is no question in this case but that a robbery did in fact take place and that the complainant, a married woman, was robbed of cash and jewellery in her house at about eight o'clock at night. The only issue which has been contested both in the Court below and on the hearing of this appeal, is the question of identity. There was, in this case, a prompt report to the Police by the complainant immediately after the robbery. But nevertheless no arrest was made until nearly eight months later. The reason for this long lapse of time was not, as one might suppose, that the Police did not know whom to arrest; the reason is perhaps best given in the words of the Police Inspector in charge of the investigation who stated in evidence "I had a lot of work on hand but not so much that I could not have arrested that man and had a parade much earlier had I chosen to do so, but I thought I had better not." This delay on the part of the Police in making the arrest of the appellants is all the more remarkable in view of the fact that the second appellant, according to the case of the prosecution, returned to the complainant's house the day after the robbery. The complainant did not, however, inform the Police at that time and subsequent events took a rather unusual turn. The second appellant, at some date which does not appear from the record, married the complainant's sister. He married into the family as it were, although in doing so, we do not suppose he expected a few months later to be denounced by his sister-in-law to the Police for his part in this prenuptial robbery. The Crown's explanation, and indeed it calls for an explanation, of this extraordinary delay on the part of the principal witness in informing the Police of the identity of one of the robbers is that the complainant was at the time pregnant and she was also frightened. But it is also part of the Crown's case that the night before, that is to say, on the night of the robbery, she did complain to the Police and went out with the Police in their car looking for suspects. It is a strange argument to say that the complainant, although pregnant and frightened, could assist the Police by making a report on the night of the robbery but the following day, when one of the robbers called

at her house, those same disabilities prevented her from bringing that matter to the notice of the Police.

The seriousness of the delay in this case is that it was very prejudicial to the defence of at least one of the appellants. The first appellant has said throughout that he is of good character and was not at the scene of this robbery. But when he sought to prove his *alibi*, he was, because of the long delay, in some difficulty as he could not remember exactly where he was on the night in question but he thought he was with his younger brother in the kampong. As the learned trial Judge put it in his summing-up: "Eight months later he just could not say where he was on that particular night". Therefore the result of this long delay which is not satisfactorily explained was that it became practically impossible for the first appellant assuming he had a good *alibi* to prove it satisfactorily.

After the arrests were made, the conduct of the investigation was even more unsatisfactory. An identification parade was held with a view to identifying the first appellant. Twelve persons were put up on the identification parade and the complainant was asked if she could identify any one. She failed to do so and all present on the parade were dismissed with one exception. That exception was the first appellant. He was taken by the officer-in-charge of the parade and presented to the complainant and, as the learned Judge says in his summing-up: "The complainant was then asked, Is he the man? She said yes." It is quite plain that this method of conducting an identification parade and the conduct of the officer-in-charge subsequent to the parade were highly irregular and prejudicial to the suspected person; it was, we regret to say, an unfair method of conducting the investigation. Counsel for the Crown in arguing this appeal very fairly conceded that evidence of identification obtained in this manner is worthless and indeed he informed the Court that the Crown did not rely on it. We were glad to hear Counsel for the Crown making this admission to the Court but we feel bound to point out that it is most unfortunate in these circumstances that this evidence was ever placed before the jury at all; particularly as the appellant was unrepresented.

The second appellant was not put up on any identification parade at any time but he was identified by the complainant in the dock at the preliminary inquiry before the Magistrate. During the long interval of eight months before his arrest, in addition to marrying the complainant's sister to which we have already made reference, he did, according to the evidence of the prosecution, go with the complainant and with a Police Inspector to a jeweller's shop with a view to recovering some of the stolen property and in fact some of the property was recovered in this way. The

curious feature of the prosecution's case is that although according to the complainant's evidence, a Police Inspector was a member of the party who made these visits to the jewellers, no evidence was given by the Police on this particular matter. If it was material — and we have our doubts whether it could be material in the circumstances to prove the identity of this second appellant as one of those taking part in this robbery — then in our view the Police should have given some evidence in corroboration of the complainant's story, and should not have left it entirely to this witness. The learned Judge rightly regarded her evidence on this particular aspect of the case as worthless, and he said in terms in his summing-up to the jury: "You must not attach any weight to that against him". Nevertheless the evidence was given and it was very prejudicial to the second appellant, although worthless from a prosecution's point of view. It is another unsatisfactory feature in this case.

Now with regard to the third appellant, the prosecution's case is a little stronger because the evidence given at the trial shows that the complainant did identify him at an identification parade. At the hearing of this appeal however, when the third appellant was asked what he wanted to say to the Court, he stated that when he was picked out at an identification parade, the other persons on the parade were school boys with two exceptions; those two exceptions were tall persons like himself. He then went on to say that those two tall persons were taken away from the parade before the complainant was actually asked if she could make her identification and he summed up his version of that identification parade by saying he thought it was unfair. If his account of it is truthful and accurate, it certainly was unfair. Counsel for the Crown was asked about this matter and he informed the Court that the Crown denied the third appellant's version but it appeared on subsequent examination of the record that in fact this issue was never raised by either the third appellant or by the Crown during the course of the hearing in the Court below and consequently this particular matter also was left in a rather unsatisfactory state.

But the unsatisfactory nature of the prosecution's case does not rest there. The prosecution called an accomplice to support their case. He said that he was one of the gang who committed this robbery. There were four in the gang, himself and the three appellants in the dock. He said, moreover, that the robbery was organised in such a way that only three of the gang went into the house to commit the robbery and the fourth was left standing outside, keeping watch. He then went on to say — this is very important — that he was one of the three inside the house, from which it follows that one of the appellants was the one who was standing outside the house keeping watch. Now the complainant's

story is that she saw only three members, namely, the three who came into the house to commit this robbery. Of course that is consistent with there being a fourth member of the gang outside keeping watch, but if there was such a person, she did not see him. The complainant, however, identified all these three appellants as being the three who were in the house committing the robbery. The prosecution offer no explanation of this glaring discrepancy between the evidence of the complainant and of the accomplice. It is just one more unsatisfactory feature in this case.

Now the question arises as to what the Court should do in a case of this kind. Ordinarily, there can be no doubt that where the jury have been properly directed by the learned Judge in his summing-up and in a case, where the prosecution rely upon an accomplice's evidence, he has warned them strictly and with emphasis that they should not proceed upon the evidence of the accomplice unless it is corroborated this Court will not interfere if the jury convict. But at the same time the words of the Ordinance under which this Court is constituted and exercises its jurisdiction require that "the Court of Criminal Appeal . . . shall allow the appeal if they think the verdict of the jury should be set aside on the ground that it is unreasonable and cannot be supported having regard to the evidence." These words which are identical with the words appearing in the English Court of Criminal Appeal Act 1907, have been commented on by Mr. Justice Humphreys, one of the most learned and experienced criminal Judges of our time, in the following terms in *R. v. Barnes*⁽¹⁾: "Those last words, (meaning thereby, the words in the section which I have just read) have been interpreted in more than one case in this Court as amounting to this: — "If the Court thinks that the verdict is on the whole, having regard to everything that took place in the Court of trial, unsatisfactory." We have instanced not one but several unsatisfactory features in this case which in our view clearly bring it within this *dictum* of Mr. Justice Humphreys. The conclusion which we have reached after giving the matter the most careful consideration is that the prosecution's case, in the well-known words of Lord Hewart in *R. v. Wallace*⁽²⁾, "was not proved with that certainty which is necessary in order to justify a verdict of guilty and therefore the conviction cannot be allowed to stand."

We desire, however, to make it plain that in taking this exceptional course we are not initiating any new principle but merely applying a well-established principle to a case which is very exceptional on account of the many unsatisfactory features of the prosecution's case. The appeal is allowed and the convictions are quashed.

Appeal allowed